No. 83-1401

# In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD C. FELTON AND MARIANNE V. FELTON,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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## TABLE OF AUTHORITIES

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Petitioner challenges the court of appeals' holding that she was not entitled to deduct as a business expense the cost of commuting between her personal residence and her place of employment. The decision below is correct and does not conflict with that of any other circuit. There is no basis for review by this Court.

1. During 1978, petitioner and her husband[1] resided in Bloomington, Indiana (Pet. App. 2). Petitioner's husband worked in Bloomington (*ibid.*). In August 1978, after trying unsuccessfully to find satisfactory employment closer to Bloomington, petitioner accepted a full-time position at a university in New Albany, Indiana, some 100 miles away (*id.* at 3). Her duties at the university included teaching

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[1] Petitioner's husband is a party solely by virtue of having filed a joint return with her for the tax year in question.

classes, preparing for class, holding office hours, and doing research (*id.* at 3, 17). She was required to be in New Albany to fulfill her teaching and student-counseling duties, and the university provided her with an office and a classroom for those purposes (*id.* at 3). Petitioner was otherwise free to reside where she pleased (*id.* at 9).

After she accepted the job in New Albany, petitioner and her husband continued to maintain their personal residence in Bloomington (Pet. App. 16). To minimize the expense of traveling, petitioner scheduled her university classes and office hours so as to limit her overnight stays in New Albany to two nights each week (*id.* at 3-4, 16). She did all her teaching and student counseling, and much of her class preparation, in New Albany (*id.* at 17). She did some of her class preparation, and most of her research, in Bloomington (*ibid.*).

From August 1978 through December 1978, petitioner incurred $1,700 in expenses commuting between Bloomington and New Albany and securing overnight lodging in the latter city twice a week (Pet. App. 5). She deducted these expenses for federal tax purposes under Section 162(a)(2) of the Code,[2] which permits the deduction of "ordinary and necessary [business] expenses paid or incurred during the taxable year," including "traveling expenses * * * while away from home in the pursuit of a trade or business." On audit, the Commissioner disallowed the claimed deduction. He contended that petitioner's "home" for tax purposes was New Albany, and hence that she did not incur the expenses "while away from home." Alternatively, he argued that petitioner's decision to reside in Bloomington was a personal one, unaffected by employment requirements, and

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[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

hence that she did not incur the traveling expenses "in the pursuit of a trade or business" (Pet. App. 19).

The Tax Court, in a memorandum decision, upheld the Commissioner's determination (Pet. App. 13-25). It found that petitioner's principal place of business, and thus her tax "home," was New Albany, reasoning that "[t]he focal point of a university lecturer's duties is teaching in the classroom and dealing with students," activities that "take place almost exclusively on campus" (*id.* at 22). The fact that petitioner did most of her research in Bloomington, the court concluded, did not make that city her tax "home," since she "chose to center her research activities [there] for personal reasons" (*id.* at 22-23). Having concluded that petitioner's traveling expenses were nondeductible because not incurred "while away from home," the Tax Court did not address the Commissioner's alternative contention that they were nondeductible because not incurred "in the pursuit of a trade or business" (*id.* at 24-25 n.7).

The court of appeals affirmed in an unpublished judgment order (Pet. App. 2). It noted that the deductibility of traveling expenses " 'is purely a question of fact in most instances.' " *Id.* at 6-7 (quoting *Commissioner* v. *Flowers*, 326 U.S. 465, 470 (1946)). It held that "[t]here was sufficient evidence for the Tax Court to find that [petitioner's] tax 'home' was New Albany," rather than Bloomington, as she contended (Pet. App. 10).

2. In holding that petitioner could not deduct her commuting costs, the courts below reached the only result consistent with the statutory scheme and with the decisions of this Court. Section 162(a)(2), as noted above, authorizes the deduction of "traveling expenses" incurred by a taxpayer "while away from home in the pursuit of a trade or business." Section 262, by contrast, prohibits the deduction of "personal, living, or family expenses." Thus, as this Court

has held, a travel expense must meet three requirements to be deductible: (1) it must be "reasonable and necessary," (2) it must be "incurred 'while away from home,' " and (3) it must be "incurred in pursuit of business." *Flowers*, 326 U.S. at 470 (1946). "Failure to satisfy any one of the three conditions destroys the traveling expense deduction" (*id.* at 472).

As the courts below properly concluded (Pet. App. 6, 20), Section 162(a)(2) provides an exception to the general prohibition against deduction of living expenses only to the extent necessary to mitigate the burden on a taxpayer who must maintain two places of abode, and thereby incur duplicative living costs, because of the exigencies of his trade or business. "The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors." *Flowers*, 326 U.S. at 474. The deduction for business-motivated traveling expenses is not available to a taxpayer, like the taxpayer here, whose decision to "incur[] extra living expenses in [one city], while doing much of his [or her] work in [another], [is] occasioned solely by his [or her] personal propensities." *Flowers*, 326 U.S. at 473-474. Accord, *e.g.*, *Daly* v. *Commissioner*, 662 F.2d 253 (4th Cir. 1981) (en banc), aff'g 72 T.C. 190 (1979).

3. Contrary to petitioner's contention (Pet. 8-14), there is no conflict among the circuits on the question presented. To be sure, the courts of appeals do disagree as to the meaning of the word "home" as used in Section 162(a)(2). The court below, following the Tax Court and the majority of the circuits, concluded that a taxpayer's "home" for Section 162 purposes is his principal place of business. Pet. App. 8-9, 12 n.4.[3] The Second Circuit, by contrast, has consistently held

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[3]Accord, *e.g.*, *Markey* v. *Commissioner*, 490 F.2d 1249 (6th Cir. 1974); *Curtis* v. *Commissioner*, 449 F.2d 225 (5th Cir. 1971); *Wills* v. *Commissioner*, 411 F.2d 537 (9th Cir. 1969); *Barnhill* v. *Commissioner*, 148 F.2d 913 (4th Cir. 1945); *Mitchell* v. *Commissioner*, 74 T.C. 578 (1980).

that a taxpayer's "home" is the site of his personal residence.[4] This disagreement, however, is merely academic, and has not given rise to any actual conflict of decision.

The courts of appeals have disagreed on this definitional issue for over 40 years. See *Coburn* v. *Commissioner*, 138 F.2d 763 (2d Cir. 1943). This Court acknowledged the disagreement in *Flowers* (326 U.S. at 472), but "deem[ed] it unnecessary * * * to enter into or to decide [it]." See *Commissioner* v. *Stidger*, 386 U.S. 287, 292-294 (1967). It is equally unnecessary to resolve the disagreement here. Whenever a taxpayer incurs travel expenses because of the fact that he lives and works in different places, the deductibility of those expenses in the final analysis turns on whether the separation between his places of residence and employment is "required by 'the exigencies of business' " or is occasioned by personal considerations. *Peurifoy* v. *Commissioner*, 358 U.S. 59, 60 (1958) (per curiam) (quoting *Flowers*, 326 U.S. at 474). Since the courts below found that petitioner incurred the disputed travel expenses for personal reasons, their decisions were correct regardless of whether petitioner's "home" for Section 162(a)(2) purposes is considered to be Bloomington, as she contends (Pet. 18-19), or New Albany, as the courts below held (Pet. App. 10, 22-23). Because the facts here, like the facts in *Flowers*, "demonstrate clearly that the expenses [at issue] were not incurred in the pursuit of the business of the taxpayer's employer" (326 U.S. at 473), it is immaterial whether those expenses were incurred at, or away from, petitioner's "home." See *id.* at 470, 472.

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[4] *E.g.*, *Six* v. *United States*, 450 F.2d 66 (2d Cir. 1971); *Rosenspan* v. *United States*, 438 F.2d 905 (2d Cir.), cert. denied, 404 U.S. 864 (1971); *Coburn* v. *Commissioner*, 138 F.2d 763 (2d Cir. 1943).

4. Petitioner's assertion (Pet. 20-26) that the decision below fails to recognize the plight of two-wage-earner families, and that it will aggravate the marital strains inherent in such families, provides no ground for review by this Court. Such policy considerations are matters of congressional, not judicial, concern. See *Daly* v. *Commissioner*, 662 F.2d at 255 (Murnaghan, J., concurring).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

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